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No. 00-482

In the
Supreme Court of the United States

INTERNATIONAL BUSINESS MACHINES CORP.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus curiae will address the following question:

Whether the Government's retention of interest earned on monies collected under the unconstitutional Harbor Maintenance Tax on exports is a taking of private property for which "just compensation" is required by the Fifth Amendment?

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BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae* submits this brief in support of petitioner.[1] Both parties have consented to the filing of this brief.

[1] No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, no persons other than *amicus curiae* contributed financially to the preparation of this brief.

INTERESTS OF AMICUS CURIAE

Defenders of Property Rights is the only national legal defense foundation dedicated exclusively to protecting private property rights. Defenders was founded as a non-profit legal foundation in 1991. Its mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual liberty. Defenders of Property Rights engages in litigation across the country on behalf of its members and the public interest to prevent government incursion in to protections guaranteed by the Bill of Rights. Defenders participated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Keene Corp. v. United States*, 508 U.S. 200 (1993), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Bennett v. Spear*, 520 U.S. 154 (1997), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); and, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000), when they were before this Court.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

In 1986, Congress established the Harbor Maintenance Tax ("HMT"), as part of the Water Resources Development Act. 26 U.S.C. §§ 4461-62. The HMT applied a 0.125 percent *ad valorem* fee on the value of commercial cargo transported on vessels using federally maintained navigation projects. 26 U.S.C. § 4461. All HMT revenues collected were placed in a discrete fund maintained as the Harbor Maintenance Trust Fund ("HMTF").[2] 26 U.S.C. § 9505.

The HMTF funds did not sit idle; rather, they were invested in short- and long-term securities, earning interest which was also deposited into the HMTF. Over the course of an 11-year period during which the HMT was in effect, the Government reported that it had collected and deposited approximately $5.386 billion into the HMTF. ANNUAL REPORT TO CONGRESS ON THE STATUS OF THE HARBOR MAINTENANCE FUND FOR FISCAL YEAR 1998 at 13 (Table 4) (Pet. App. 53a). Of that total, the CIT estimated, as of September 30, 1998, that approximately $1.435 billion was

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[2] In 1999, legislation was proposed to replace the HMTF with the Harbor Services Fund ("HSF") to establish a closer link between the revenue collected and the services provided to project users. *See* Harbor Services Fund Act of 1999, H.R. 1947, 106th Cong. (1999).

collected from exports, which now must be refunded to the exporters. *Id.* From 1988 to 1998, the government reported that it accrued approximately $267,873,000 as interest on the investments in short- and long-term securities. ANNUAL REPORT at 17 (Table 6) (Pet. App. 56a).

On March 31, 1998, the Court held that the HMT violated the Export Clause of the Constitution as it applies to exports. *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998) (Pet. App. 1a-14a). The government has steadfastly contended that even though it must refund the export taxes that it unconstitutionally collected, it may nevertheless keep the interest the export taxes generated. To resolve this issue, the Court of International Trade ("CIT") designated this case as a "test case" to determine whether interest must be paid on the $1.289 billion collected under the unconstitutional HMT. *International Business Machines v. United States*, 201 F.3d 1367, 1370 (Fed. Cir. 2000) (citing *International Business Machines Corp. v. United States*, No. 94-10-00625, 1998 WL 325156 at *1, slip op. 98-78 (Ct. Int'l Trade June 17, 1998)) (Pet. App. 5a); *see also* ANNUAL REPORT at iv (Pet. App 47a). The CIT held that petitioner, and all other similarly situated exporters subject to the HMT, are entitled to the interest pursuant to 28 U.S.C. §

2411. *International Business Machines*, 1998 WL 325156 at *1 (Pet. App. 35a).

On appeal, the Federal Circuit Court of Appeals reversed, holding that there was no statutory basis for the award of interest on the tax refund. *International Business Machines Corp.*, 201 F.3d 1367 (Fed. Cir. 2000) (Pet. App. 3a-14a). Although the issue of interest has been raised in prior briefs in the course of this litigation, the court below did not address the questions of who owns the interest accrued on the HMTF and whether the government's refusal to return the interest to the petitioner violates the Fifth Amendment.

The decision of the court below that respondent may retain interest earned on funds rightfully belonging to petitioner, raises a Fifth Amendment takings issue remarkably similar to a case decided by this Court 20 years ago. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (holding that government must return interest on money deposited into a court interpleader fund); *see also Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (holding that any interest on principal attaches as a property right incident to the ownership of the underlying principal).

Accordingly, review by this Court is necessary to ensure that respondent's retention of monies earned on funds belonging to petitioner is not violative of the Fifth Amendment.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH BACKGROUND PRINCIPLES OF COMMON LAW AND PRIOR DECISIONS OF THIS COURT HOLDING CONCLUSIVELY THAT OWNERSHIP OF INTEREST FOLLOWS OWNERSHIP OF THE UNDERLYING PRINCIPAL.

This Court has determined that the term "property" and the takings analysis is based on "background principals" of property law. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In this case, the background principals of property law are well established. As a matter of property law, "interest follows principal," and therefore the owner of the corpus of a fund is also the owner of the interest earned on it. *See, e.g., Phillips v. Washington Legal Foundation*, 524 U.S. 156, 165 (1998); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980); *Schneider v. California Dep't of Corrections*, 151 F.3d 1194, 1201 (9th Cir. 1998).

The rule that interest follows principal has been established under English common law since at least the mid-1700s and is now "firmly embedded" in the common law of the States. *Phillips*, 524 U.S. at 165.

This Court has enunciated the proposition that interest follows principal in opinions dating all the way back to the early days of the Republic. *See, e.g., Himely v. Rose*, 9 U.S. (5 Cranch) 313, 318 (1809) ("interest goes with the principal, as the fruit with the tree.") This Court has more recently observed that:

> Permitting the owner of a sum of money to distribute to a designated beneficiary the interest income generated by his principal is entirely consistent with fundamental maxim of property law that the owner of a property interest may dispose of all or part of that interest as he sees fit.

Phillips, 524 U.S. at 167-68 (citing *United States v. General Motors Corp.,* 323 U.S. 373, 377-78 (1945) (property "denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to . . . dispose of it")).[3]

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[3] In its broadest sense, "interest is the rental price of money." *Wilshire Holding Corp. v. C.I.R.*, 262 F.2d 51, 53 (9th Cir. 1958). This Court had defined interest in terms of payment for the use of money: "One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made." *Miller v.*

The foundational precept of property law, also applicable in this case, is that property rights protection is a bedrock civil right guaranteed by our Constitution. As James Madison, author of the Bill of Rights, put it: "[A]s a man is said to have a right to his property, he may be equally said to have a property in his rights." James Madison, *Property*, 1 NAT'L GAZETTE 174 (1792) (reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 480 (1865)). These rights, and more particularly property rights, derive from equitable concepts rooted in common law and in the principles of equity that are reflected in the Just Compensation Clause of the Fifth Amendment.

Encompassed within the notion of property rights protection is the historical compact recorded in the Just Compensation Clause. While a government can, under certain circumstances, "take" private property for public use, any such taking is void unless it provides for fair payment in return. U.S. Const. amend. V; *see also Fuller v. United States*, 409 U.S. 488, 490 (1973) (citation omitted) ("The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law.").

Robertson, 266 U.S. 243, 257-58 (1924). The definition of interest, therefore, emphasizes the concept of remuneration to the owner of money

Thus, just as the Court in *Phillips v. Washington Legal Foundation* concluded that the State could "point to no 'background principles' of property law . . . that would lead one to the conclusion that the owner of a fund temporarily deposited in an attorney trust account may be deprived of the interest the fund generates," respondent can likewise point to no background principles of property law that would lead this Court to the conclusion that petitioner, whose money was wrongfully maintained in the HMTF, may be deprived of the interest (property) its money generated, without payment of just compensation. *Phillips*, 524 U.S. at 168.

II. THE GOVERNMENT IS CONSTITUTIONALLY OBLIGATED TO PAY BACK THE INTEREST THAT IT EARNED ON THE USE OF PETITIONER'S PROPERTY.

By limiting its decision to a review of sovereign immunity, the court below failed to complete the necessary analysis of ownership of the interest earned on the HMTF. Put succinctly, sovereign immunity is no defense to a claim of violation of the Just Compensation Clause, nor may the government simply declare itself the owner of a fund of money and then prohibit the true owner from asserting its

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in return for temporarily giving up the custody and use of the money.

title. As this Court stated in *Jacobs v. United States*, 290 U.S. 13 (1933):

> That right [to just compensation] was guaranteed by the Constitution . . . The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. . . A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment.

Id. at 16.

In this case, the government cannot prevail in its position that it is entitled to keep the interest on petitioner's money, however, because this Court has specifically held that the government violates the Just Compensation Clause of the Fifth Amendment when it fails to pay accrued interest on private funds. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). *Webb's Fabulous Pharmacies* is squarely on point with this case.

In *Webb's*, the petitioner entered into an agreement to purchase the assets of a corporation that was heavily in debt. *Id.* at 156. To protect its interests, the petitioner filed a complaint of interpleader in state court naming as defendants both the corporation and its creditors. *Id.* at 156-57. After satisfying the claims of various creditors and withdrawing court fees, the clerk then returned the remainder of the

interpleader account, but kept the interest that the account had earned while in the possession of the court. *Id.* at 158.

This Court held that the withholding of the payment of the interest on the interpleader fund was a "taking" of private property in violation of the Fifth Amendment and that "a State by *ipse dixit*, may not transform private property into public property without compensation" nor may a State legislatively abrogate the traditional rule that the "earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." *Id.* at 164. In so holding, the Court stated:

> Seminole County has not merely "adjust[ed] the benefits and burdens of economic life to promote the common good." Rather the exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts.

Id. at 163 (quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978)).

The applicability of this Court's opinion in *Webb's Fabulous Pharmacies* to the present case could not be clearer. Exporters, including petitioner, who paid the unconstitutional HMT are now put in the position of making a "forced contribution" through the government's exaction of

the interest earned on their money while it was wrongfully maintained in the HMTF.

In *Webb's Fabulous Pharmacies*, the Court analogized the appropriation of the use of private property in physical takings cases to the government's appropriation of interest earned on private money. *Webb's*, 449 U.S. at 163-64. For example, the Court in *Webb's* relied on *United States v. Causby*, 328 U.S. 256 (1946), a physical takings case in which the Court held that the federal government had appropriated the airspace above private property for the flight pattern of military aircraft. *Causby*, 328 U.S. at 262.

Similarly, and only two years ago, this Court again faced the issue of government expropriation of interest on private money—the interest earned on client funds held in Interest on Lawyers Trust Accounts ("IOLTA"). *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). In *Phillips*, the interest in question was generated on client funds held for a short period of time in interest-bearing accounts. *Id.* at 161-62. Under State law, the interest earned on the client funds was not paid to the clients but rather was deposited in an IOLTA account and paid to the Texas Equal Access to Justice Foundation ("TEAJF"), a nonprofit foundation established by the Texas Supreme Court. *Id.* at 162. TEAJF then distributed the funds to nonprofit

organizations that provided legal services to low income persons. *Id.*

In *Phillips*, the State argued that the interest generated on the IOLTA funds was not the property of the client because the interest generated was the result of the State-created IOLTA program. *Id.* at 168-69. The Solicitor General further argued as *amicus curiae* in that case that the interest was not private property because the interest is a government-created value. *Id.* at 170. The Court, however, flatly rejected these arguments stating that "the State does nothing to create value; the value is created by respondents' funds." *Id.* at 171. Thus, the *Phillips* Court held that "the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal." *Id.* at 172.

Now, again, this Court has before it another attempt by government to transform interest earned on private money into public property. In the present case, however, respondent does not even have the argument that the interest was "government created," since the interest earned was, by respondent's own admission, generated by investment of the monies unlawfully collected from petitioner. In *Webb's* and *Phillips*, discussed above, the government was at least able to argue (albeit unsuccessfully) that it performed some service

by holding the interpleaded funds, or establishing the IOLTA interest bearing accounts. Here the "service" rendered was the collection of an unconstitutional tax—an illegal act. The court below cites no authority, and we are aware of none, holding that one who unlawfully acquires control of funds may, upon being required to return them, keep for itself the interest earned on those funds. Yet that is the result of the holding below.

CONCLUSION

This case grew out of the government's imposition of an export tax which violated one provision of our Constitution. Left standing, the decision of the court below would allow the government to profit handsomely from that unconstitutional enactment by retaining a portion of the Harbor Maintenance Trust Fund—the interest earned on monies rightfully belonging to petitioner—in violation of another provision of the Constitution, the Just Compensation Clause of the Fifth Amendment. This compounding of constitutional violations is contrary to existing precedents of this Court. Accordingly, it is incumbent upon this Court to resolve this issue.

Respectfully submitted,

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